Teledyne Industries, Inc., Teledyne Ryan Aeronautical Division *and* Tyrone Lewis Goodwin. Case 21–CA–26426

November 30, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On November 7, 1989, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Tyrone Lewis Goodwin was an area shop steward who worked in the composites department of the Respondent's San Diego plant where aerospace products are manufactured. In March 1988[1] Goodwin was discharged, but later returned to work in May when his grievance concerning his discharge was settled. As part of that settlement, Goodwin signed a ''last chance'' reinstatement agreement, promising excellent attendance, including remaining at his assigned work station.

On July 18, Supervisor Brad Zachau observed Goodwin away from his work station, without permission to conduct union business, talking to Union Steward Jones at the tool crib. Goodwin claimed that, while he was waiting for some material to take back to his work station, Jones and another employee approached him and their conversation lasted only a couple of minutes at most. Zachau claimed that after observing Jones and Goodwin talking for 10 minutes he decided to give a verbal warning to Goodwin, who had been repeatedly disciplined for being away from his work area without permission.

Later that morning, Zachau convened a disciplinary meeting in the conference room which was attended by Goodwin, Jones, and Supervisor Mike Yavno. During that meeting, Zachau told Goodwin that he was being given a warning for violating the work rule which prohibits employees from ''Neglecting duty, loitering, wasting time, [and] being away from work station without authorization.'' When Goodwin asked to what Zachau was referring, Zachau described the earlier Goodwin-Jones conversation. Goodwin then disputed Zachau's estimate of the time spent in the conversation with Jones and called Zachau a liar at least once in this meeting. Goodwin and Jones also attempted to explain that they were discussing union business, but Zachau would not permit any explanation, even though Jones managed to say that the conversation was at his request and not initiated by Goodwin.

When Zachau handed a copy of the warning to Goodwin, Goodwin took it and said, ''This is what I think of the warning,'' and tore it in half. He then said, ''And this is what I think of you, Brad,'' and tore the warning into quarters. He then balled up the torn paper and lightly tossed it on the conference table in Zachau's direction. Zachau easily caught it. Zachau turned to Yavno and asked if that was ''insubordination.'' Yavno replied that it was, whereupon Zachau told Goodwin that he was being suspended. Shortly thereafter, the Respondent converted Goodwin's suspension to a discharge. Chris Gannon, the Respondent's manager of labor relations, decided to discharge Goodwin because he agreed that Goodwin's conference room behavior had constituted insubordination and also violated the May reinstatement agreement.

Goodwin's discharge was grieved and arbitrated. After a hearing, the arbitrator issued a decision dated November 23, which was subsequently clarified on March 6, 1989. According to the arbitrator's original decision, the Union and the Respondent jointly stipulated that the arbitrator was to consider whether Goodwin's discharge was for just cause and, if not, what should be the proper remedy. The Union took the position that Goodwin, an active union representative, had been disciplined because he engaged in union activities which the Respondent did not like and that there had been no insubordination by Goodwin in the July 18 conference room meeting. In this latter connection, the Union specifically argued that the July 18 Goodwin-Jones conversation involved a discussion of another employee's problem and did not take an exorbitant amount of time. On the other hand, the Respondent argued that Goodwin did not have permission, generally or as a union steward, to be away from his work area on July 18; that his conversation with Jones lasted 10 minutes; and that Goodwin was terminated for his insubordinate acts during the conference room meeting and not for the July 18 Goodwin-Jones conversation.

The arbitrator agreed with the Respondent's position and denied the grievance. Crediting the Respondent's version of events, the arbitrator found that Goodwin was discharged for just cause.[2] In his later clarification, which is set out more fully in the judge's decision, the arbitrator indicated that in considering the grievance he had not been specifically presented with an issue dealing with the NLRA, but was aware that a Board charge, claiming protected activity by Good-

[1] All dates are in 1988 unless otherwise indicated.

[2] Art. XXIV of the applicable contract incorporates company rules affecting employee behavior and indicates that ''any infractions of these rules may constitute cause for disciplinary action and willful violation of any rules may constitute just cause for discharge.''

win, had been filed or would be filed. He also stated that Goodwin was not discharged for conduct protected by the NLRA. He summarized that ''Goodwin was discharged for his behavior in the conference room in refusing to accept the verbal warning, being insubordinate to his supervisor/manager by his physical and verbal reaction'' and that Goodwin ''was not engaged in appropriate union activity on the morning in question.''

The complaint alleges that since 1984 ''Goodwin has been the elected shop steward of the Union representing employees in [the] Respondent's Department 123'' and that ''[the] Respondent suspended and then discharged Goodwin . . . because he engaged in protected union activities.''[3] The record shows that the General Counsel contends that Goodwin was disciplined for his conduct during the conference room meeting with Supervisors Zachau and Yavno. In his posthearing brief to the judge, the General Counsel argued that Goodwin's statements and actions in that meeting were protected because they occurred during a ''grievance'' meeting and because Goodwin had been provoked by the Respondent, first, by being disciplined for earlier engaging in a union-related conversation with Jones, and, second, by being ignored when he tried to explain to Zachau and Yavno the purpose of the Jones' conversation.

The judge characterized the General Counsel's complaint theory as one based on an asserted pretext on the part of the Respondent to dispose of Goodwin as a steward. The judge then declined to defer to the arbitration award upholding Goodwin's discharge. After reviewing the deferral standards set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984), the judge concluded that the arbitrator had failed to consider the unfair labor practice issue involved and that the arbitrator's decision was repugnant to the policies of the Act. The judge believed that the arbitrator had decided significantly different issues because he was never asked to review Goodwin's discharge in light of the nondiscrimination clause under the applicable contract.[4] The judge also viewed the arbitrator's analysis as defective because he never considered the Goodwin-Jones conversation as possible protected activity. In addition, the judge found the arbitrator's decision was not susceptible to an interpretation consistent with the Act. For the reasons set forth below, we do not adopt the judge's conclusion, but rather we shall defer to the arbitration award and dismiss the complaint in its entirety.[5]

To determine whether the arbitrator adequately considered the unfair labor practice involving Goodwin, we must decide if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. Differences, if any, between the contractual and statutory standards of review should be weighed under the standard of whether the award is clearly repugnant to the Act. See *Olin Corp.*, supra at 574. We observe that the burden of persuasion rests with the General Counsel to demonstrate that either of these standards has not been met. See *Olin Corp.*, supra at 574–575. After careful review of the record, we find that the record does not establish that the statutory and contractual issues are not factually parallel or that the facts relevant to resolving the unfair labor practice issue were not presented generally to the arbitrator.

In examining whether Goodwin had been discharged for just cause, the factual questions that were predicates to the arbitrator's decision were (1) whether the verbal warning issued to Goodwin on July 18, which precipitated the conference room ''disciplinary'' meeting was proper; and (2) whether and to what degree Goodwin's insubordinate conduct during the July 18 ''disciplinary'' meeting warranted his discharge. Indeed, as shown in his original decision coupled with his later clarification, the arbitrator found that the Company's closer scrutiny of Goodwin's whereabouts on July 18 was justified by his continual misconduct since the May reinstatement agreement; that during Goodwin's conversation with Jones, which lasted 10 minutes, he ''was not engaged in appropriate union activity,'' but was in violation of his earlier reinstatement agreement; that the July 18 verbal warning followed the established corrective progressive discipline scheme; and that Goodwin's admitted conference room behavior constituted insubordination and violated his reinstatement agreement. The arbitrator found that Goodwin had not complied with the reinstatement agreement and had indicated that ''he most likely will not change.'' Hence, he concluded that ''notwithstanding, his special status with the Union, he has received all of the special treatment which is expected.''

In addressing these matters, the arbitrator also necessarily rejected the Union's assertions to him that Goodwin's status as a union steward or his performance of his steward duties motivated his discharge. Moreover, the factual questions considered by the arbitrator are virtually coextensive with those that would

[3] The complaint does not specify in any greater detail the union activities which the General Counsel contends led to Goodwin's discipline.

[4] Art. XXVI of the contract reads, in relevant part:

> The Company and the Union will abide by all applicable Equal Employment Opportunity laws. Both parties agree that the provisions of this Agreement shall apply to all employees covered by this Agreement without discrimination, and in carrying out their respective obligations under this Agreement neither will discriminate against any employee on account of race, color, national origin, age, sex, religion, Union participation or nonparticipation or against any handicapped employee as per applicable law.

[5] We note that it is undisputed that the arbitration proceeding appeared to be fair and regular and that all parties agreed to be bound.

be considered by the Board in a decision on the statutory question regardless of whether the General Counsel's theory of the violation was that Goodwin's discipline was motivated by his assertedly protected union conduct at the toolshed with Jones or during the conference room meeting, or by his status as a union steward. See *Garland Coal & Mining Co*., 276 NLRB 963, 964 (1985). On the merits, the Board would, under *Wright Line*,[6] determine in the first instance whether the General Counsel had established a prima facie case that the discipline and/or discharge was motivated by Goodwin's union-related conduct and, if the General Counsel had made such a case, would then determine whether the Respondent would have discharged Goodwin even in the absence of his protected union activities. Thus, given how the issues were framed and presented to the arbitrator in the circumstances here, his ''just cause'' determination was factually parallel to the unfair labor practice issue.

We also find that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, the General Counsel did not argue nor establish that the arbitrator was lacking any evidence relevant to the determination of the unfair labor practice issue. Unlike the judge, we do not view the arbitrator's failure to refer to the contractual nondiscrimination clause as a critical omission, because the arbitrator was clearly cognizant of the General Counsel's union discrimination theory by virtue, inter alia, of the Union's contentions and as reflected in the factual summary set forth in the arbitrator's original decision.[7]

Finally, we turn to whether the arbitrator's decision is clearly repugnant to the purposes and policies of the Act. We find, contrary to the judge, that the General Counsel has failed to show that the arbitrator's decision is not susceptible to an interpretation consistent with the Act.[8] The arbitrator, unlike the judge, credited the Respondent's version of the events. In light of his factual findings, the arbitrator determined that Goodwin was not disciplined for protected union activities.[9] As the Board observed in *Andersen Sand & Gravel Co*., 277 NLRB 1204 fn. 6 (1985),

> Deferral recognizes that the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board. This possibility, however, is one which the parties have voluntarily assumed through collective bargaining.

Accordingly, we find that the arbitrator's decision satisfies the requirements of *Olin* and that the General Counsel failed to satisfy his burden of proof that deferral is unwarranted.[10]

ORDER

The complaint is dismissed.

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[7] Cf. *Dick Gidron Cadillac*, 287 NLRB 1107 (1988), enfd. 862 F.2d 304 (2d Cir. 1988), and *Ryder/P.I.E. Nationwide*, 278 NLRB 713, 717 (1986), enfd. 810 F.2d 502 (6th Cir. 1987) (no deferral to arbitration award where evidence bearing on the statutory issue was not presented to the arbitrator).

[8] Cf. *Cone Mills Corp*., 298 NLRB 661 (1990), where the Board declined to defer to an arbitration award of reinstatement but without backpay to an employee disciplined for engaging in union and protected activity.

[9] In finding repugnancy with the Act, the judge relied on *Garland Coal & Mining Co*., supra, which we find distinguishable. In that case, the Board refused to defer to an arbitrator's award because it had upheld discipline of an employee for engaging in protected activities as a union representative. In particular, the arbitrator specifically found that the employee had been approached in his capacity as a union representative, not as an employee, and was discharged for refusing to sign a document which he considered was inconsistent with the union's interpretation of the collective-bargaining agreement.

[10] Chairman Stephens acknowledges that the burden allocations in this case are governed by *Olin Corp*., 268 NLRB 573 (1984); for institutional reasons, he agrees that deferral to the arbitrator's decision is appropriate.

Robert R. Petering, for the General Counsel.
James K. Smith and *Robert P. Stricker* with *James Kawano* on Brief) *(Gray, Cary, Ames & Frye)*, of San Diego, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in San Diego, California, on June 21, 1989, on a complaint issued by the Regional Director for Region 21 of the National Labor Relations Board on February 3, 1989. It is based on a charge filed by Tyrone Lewis Goodwin, an individual (Goodwin) on October 7, 1988. It alleges that Teledyne Industries, Inc., Teledyne Ryan Aeronautical Division (Respondent) has committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

Issues

The first issue which must be decided is whether the Board should defer to an arbitral decision holding that Respondent was justified in discharging its employee Goodwin, a union steward, effective July 18, 1988. If not, the second issue to be decided is whether it discharged Goodwin in violation of Section 8(a)(3) and (1) of the Act.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Both the General Counsel and Respondent have filed briefs which have been carefully considered. Based on the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delware corporation, manufactures aerospace products at its facility in San Diego, California, where

it annually sells and ships goods and products valued in excess of $50,000 to customers located outside California. Respondent admits it is an employer engaged in commerece within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local No. 506 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Incident*

The salient facts of this matter are straightforward. Goodwin is an area shop steward who works in the composites department at Respondent's San Diego helicopter plant. He regularly works in a portion of that department known as team area 63. His job is to fabricate fiberglass parts utilizing activated resins. As a union steward he is often called on by fellow employees either to represent them in resolving differences with supervision or to explain both parties' duties and obligations under the collective-bargaining contract and related documents.

Also located in the same department is the chairman of the Union's bargaining committee, James ''Jay'' Jones. Jones, because of his enhanced union duties, which include being chief steward, oversees stewards throughout the plant and is in regular communication and contact with Respondent's industrial relations department. As a result, unlike area stewards such as Goodwin, Jones has free rein over the plant, subject to following a departmental pass rule, obligating him to report his presence to the supervisor of any department the chooses to visit. His entire salary is carried on an overhead account.

Similarly, Goodwin, when performing union representation duties, is supposed to get permission from his supervisor and to convert his time from production to overhead when those duties are more than momentary. According to Jones, Goodwin's practice on this issue is nearly identical to that of other area stewards. Apparently, the Union and Respondent have different and not-too-compatible views on what the appropriate length of time is before the timecard conversion is to take place. Respondent thinks it should occur nearly every time such a conversation takes place; the union officials say such a view is unrealistic because it takes a few moments to assess the probable length of the conversation. Thus, they assert neither permission nor timecard conversion is necessary for short conversations, even those in excess of 10 minutes; sometimes, they say, their work is not at all interrupted by employee questions for they are oftern able to answer them without ceasing their task.

On July 18, 1988, during the morning break, Jones learned of an altercation which had occurred between two employees, one of whom had a substance abuse problem about which Jones was already aware. He says he subsequently received a call from the industrial relations department asking him to come to that office, apparently to deal with that incident. Since he had to leave the area to comply, it became necessary tell his fellow steward Goodwin that he was to be absent for a short while and to alert Goodwin to the problem involving the troubled employee. He went to Goodwin's work station, which was nearby, but Goodwin was not there. He looked around and at first was unable to find him. As he walked toward the toolcrib, still looking, another employee came to Jones asking him to look into the troubled employee matter, too. When they arrived at the aisle leading to the toolcrib, Jones observed Goodwin ''in the waiting mode'' at that location. This meant Goodwin had placed an order for activated resin with the toolcrib employees and was awaiting its delivery so he could take it to his workstation.

Jones and the other employee approached Goodwin, whereupon Jones began to explain the need for his absence. He asked Goodwin if he was aware of the situation involving the troubled employee. As they talked, Goodwin's resin order became available; he picked it up and the two continued their conversation in the aisle. Both Jones and Goodwin say the conversation lasted only a couple of minutes at most; Jones, for argument's sake, says he is willing to concede it lasted 5 minutes, but says it was actually less.

Goodwin's immediate supervisor, Brad Zachau, observed the two talking; he was standing at the other end of the aisle to the toolcrib. He says he was particularly sensitive to Goodwin's wasting time and failing to get permission to conduct union business. He claims he had given Goodwin numerous warnings about that since May. Goodwin had been returned to work in May after a 2-month suspension in March.[1] Zachau says he looked at his watch and began timing the conversation. He says he came back and noticed the conversation ending 10 minutes later. Because of his past experience with Goodwin, including oral admonishments, he determined to give Goodwin a so-called verbal warning. That warning is actually a written warning on a company form.

There is some discrepancy between Zachau and Jones with respect to the timing of the following event, but their differences are not of great concern. Zachau says that immidiately upon realizing 10 minutes had passed while Goodwin talked with Jones, he obtained the warning forms and then went straight to Jones who was at his desk, asking him to bring Goodwin to the nearby conference room. Jones says Zachau did not approach him until after he had returned from his visit to the industrial relations department.

Jones did collect Goodwin and both proceeded to the conference room where they met with Zachau and his superior, Mike Yavno, whose office is adjacent to the conference room. Zachau told Goodwin he was issuing him a verbal warning for violating the work rule which prohibits employees from ''Neglecting duty, loitering, wasting time [and] being away from work station without authorization.'' When Goodwin asked to what Zachau was referring, he described the conversation which had occurred in front of the toolcrib. Both Goodwin and Jones became incredulous and attempted to explain what their purpose was. Zachau would not permit any explanation, even though Jones managed to say that the

[1] In March 1988 Goodwin had become involved in some sort of scuffle with another supervisor, and had been discharged. He grieved the matter and was returned to work in May after the grievance was settled. The settlement consisted of Respondent's converting the discharge to a 2-month suspension without backup and Goodwin signing a ''Statement of Commitment'' in which he agreed, among other things, to ''remain[] at my assigned work station'' and to ''be a good citizen of the Company, helping to create a positive attitude among fellow employees.'' He denies being responsible for the scuffle and says he signed the agreement as it was the only practical way to get back to work.

conversation was at his request and not initiated by Goodwin. Zachau ignored him.

Yavno asserts that Goodwin entered the office in an excited fashion and was uncooperative. His testimony on that point is discredited. Goodwin and Jones were regularly called to the office to discuss union-management matters and there was no need for Goodwin to be especially concerned about the purpose of this meeting; that being the case it is improbable that he would have become agitated or uncooperative until the purpose of the meeting had been explained. It is, I think, true that Goodwin disputed Zachau's estimate of the time spent in the conversation with Jones, and called Zachau a liar at least once in this meeting. Goodwin's affidavit suggests that he did so; he admits doing it a few days later when Respondent's full investigation began. On that latter occasion he accused Zachau of lying when Zachau claimed to have warned him over forty times since his return that he was wasting time.

Zachau had two copies of the form in front of him. He wrote the number ''25'' on one (referring to the appropriate rule number) and handed it to Goodwin. Annoyed at the entire proceeding which both he and Jones viewed as unfair, Goodwin picked it up and said, ''And this is what I think of you, Brad,'' and tore the sheet in quarters. He then balled up the torn paper and lightly tossed it on the conference table in Zachau's direction. Zachau easily caught it. He turned to Yavno and asked if that was ''insubordination.'' Yavno replied that it was, whereupon Zachau told Goodwin he was being suspended and to surrender his badge. Jones and Goodwin assert that Zachau also said the suspension was for ''destruction of company property,'' i.e., tearing up the paper. Jones agrued that such a claim was ridiculous, that the paper which had been given Goodwin was now his and he could do what he liked with it. Although Zachau denies saying anything about Goodwin's destroying company property at that time, I find that he did, for he admits saying it during the joint investigative meeting a few days later.

Goodwin was escorted from the plant. Several days later, after its internal investigation was completed, Respondent decided to terminate him. According to Chris Gannon, Respondent's manager of labor relations, he reviewed what had transpired at the investigation meeting and reviewed Goodwin's overall record, including the reinstatement agreement which Goodwin had signed in May. Based on that material he concluded Goodwin should be discharged. He testified, ''The basis of the decision was . . . insubordination with the tearing of the document and rolling it up and throwing it on the table during that disciplinary meeting . . . . The second thing was . . . consideration of the reinstatement agreement, which he had signed two or three months before. And considering that, the proper thing to do was to remove this guy grom the payroll.''

Gannon said the grievance which the Union subsequently filed asserted that Goodwin's discharge was ''because he was supposedly on union activity and hadn't had a chance to talk.''

B. *The Arbitrator's Decision(s)*

The arbitrator, Philip Tamoush, upheld the discharge in his initial decision of November 23, 1988. Like Gannon, he looked to Goodwin's overall record; noted his conduct in the conference room, observing that Goodwin's behavior there was consistent with the temperament Respondent was complaining about; reviewed two (1986 and 1987) performance correction notices dealing with attendance; and considered a production warning issued in early 1988. The arbitrator was careful to incorporate Goodwin's May 11, 1988 reinstatement agreement and the underlying incident in his decision. He did refer, in the ''Contentions of the Union'' section of his decision, to Goodwin's status or performance as a union steward, but did not specifically refer to it in his conclusionary section. He does make a reference in that section to Respondent's ''special positive treatment'' of Goodwin, but that appears to refer to its earlier disciplinary approach to Goodwin, not his status or conduct as a steward.

Board's Regional Director had administratively deferred the instant charge on October 24, 1988, pending the outcome of Goodwin's grievance. On January 27, 1989, after reviewing arbitrator Tamoush's decision, the Regional Director notified the parties that she did not believe the arbitrator had addressed the issues raised by Section 7 of the Act and advised them that she was revoking her earlier administrative deferral and would issue the instant complaint. Her action prompted Respondent, by motion dated March 3, 1989, to request a clarification from the arbitrator. Specifically, Respondent asked the arbitrator to advise: (1) if he had considered the issue of whether the conduct for which Goodwin was discharged was protected by Section 7 of the Act; and (2) whether the conduct for which Goodwin was discharged was protected by the Act. The Union was not involved in the request for clarification and did not join Respondent in paying for the arbitral clarification, although it apparently did not object to the request. Neither, however, did it file any statement of position with respect to the issue as framed to the arbitrator by Respondent.

On March 6, 1989, the arbitrator issued a clarification of his earlier opinion. In answering the first question, whether he had considered that the conduct for which Goodwin was discharged was protected by the Act, he said:

> I was aware that a charge had either been filed or would be filed by the Grievant with the NLRB related to protected activity. While I was not presented specifically with an issue dealing with the NLRA, I was aware of a claim that the Grievant, as a Union Steward, might have been engaged in Union activity sometime the day of his discharge, specifically the morning prior to the behavior that actually resulted in his discharge.

With respect to the second isuse, whether the conduct for which Goodwin was discharged was protected by the Act, the arbitrator said:

> No. Mr. Goodwin was discharged for his behavior in the conference room in refusing to accept the Verbal Warning, being insubordinate to his superior/manager by his physical and verbal reaction . . . I concluded that Mr. Goodwin was not engaged in appropriate union activtiy onthe morning in question, justifying mitigation of the charges. All of Mr. Goodwin's behavior, taken in totality [including a reference to past misconduct] . . . constituted a specific violation of his Reinstatement Agreement (Statement of Commitment) of April

[actually May] 11, 1988.[2] I took this Agreement as a form of Last Chance Reinstatemnet, the violation of which would constitute cause for discharge. No reason for mitigation presented by the Union/Grievant was sufficienat to overturn the discharge action. Considering all of the circumstances, the management decision to terminate was reasonable.

IV. ANALYSIS AND CONCLUSIONS

A. *Deferral is Unwarranted*

It is, of course, our national policy to encourage arbitration of labor-management disputes. Both Section 203(d) of the Act, aimed at contract disputes, and Board decisions involving individual grievances, are designed to impel the parties to follow that procedure. For that reason, the Regional Director deferred processing this case, under the doctrine of *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp*., 268 NLRB 557 (1984), to allow the parties to attempt to resolve their differences and, inferentially, to resolve those differences applying appropriate legal analyses. In order to guarantee that the apropriate analyses have been applied, the Board will review the result reached by scrutinizing it under the standards, set forth in *Spielberg Mfg. Co*., 112 NLRB 1080 (1955), and *Olin Corp*., 268 NLRB 573 (1984). Also *Raytheon Co*., 140 NLRB 883, 884–885 (1963).

If those standards are met the Board will defer to the arbitrator's decision; if not, the Board will undertake a de novo review of the factual circumstances and decide the matter anew. *Collyer*, supra; *Spielberg*, supra; *Dennison National Co*., 296 NLRB 169 (1989). The standards for deferral set forth under those cases are as follows: The arbitral proceedings must have been fair and regular; all parties must have agreed to be bound; the arbitral decision must not be repugnant to the policies of the Act; the contractual issue before the arbitrator must be factually parallel to the unfair labor practices issue; and, the arbitrator must have been presented generally with the facts relevant to resolving the unfair labor practice. In *Olin*, the Board more finely tuned the ''clearly repugnant'' standard to say that it would not require the arbitrator's decision to be totally consistent with Board precedent, but that it would nonetheless refuse to defer to an arbitral decision if it was ''palpably wrong.'' i.e., if the arbitrator's decision was ''not susceptible to an interpretation consistent with the Act.''

The unfair labor practice complaint alleges that Respondent suspended and then discharged Goodwin because he had engaged in protected concerted activities as defined in Sections 7 and 8(a)(1) and (3) of the Act. Specifically, it asserts that he wa disciplined because he was a union steward; and that his steward activities i.e., speaking to another steward about union business, led to his discharge. In support of the complaint, the General Counsel argues that the conference room incident was so trivial it can only be viewed as a pretext to get rid of Goodwin as a steward.

The arbitrator framed the issues significantly differently. He treated the matter as one of whether just cause existed for the discharge, although I have been unable to find a protective ''just cause'' clause in the collective-bargaining contract. Apparently Respondent's behavior rules have somehow been incorporated, for it is those rules which the arbitrator focuses on. Significantly, the contract does contain a provision prohibiting Respondent from discriminating against an employee for his ''Union participation or non-participation.'' See article XXVI. Yet, the arbitrator never discussed its application to Goodwin's circumstances. Instead, the arbitrator's initial decision looks only to the two conduct rules which Goodwin is alleged to have breached—the rule against insubordination and the one enjoining time wasting and being away from one's workstation without authorization.

In the conclusions section of his decision, the arbitrator never discusses Goodwin's conversation with chief steward Jones as being conduct possibly protected by the Act. Only tangentially does he refer to Goodwin's status as a steward; indeed, he does not even discuss the Union's contention that the Jones-Goodwin conversation was initiated not by Goodwin, but by Jones, or that it involved legitimate union business.[3] Nor does he concern himself with the Union's contention that Zachau would not let Jones or Goodwin explain what they were doing or how the conversation came about. He instead focuses on Goodwin's reaction to the ''verbal'' warning, coupled it with past history[4] and concludes that Goodwin was ''insubordinate'' in the conference room and that he had thereby violated the reinstatement agreement. The arbitrator became convinced that Respondent's actions against Goodwin were reasonable and should be sustained.

When the Regional Director concluded that the arbitrator's decision was not entitled to deference, Respondent sought clarification. In his clarification decision, the arbitrator noted that he had been asked to advise whether he had considered the issue of whether Goodwin had been discharged for conduct which was protected by the Act and, if so, whether the conduct was actually protected by the Act. A fair reading of his responses leads one to conclude that the arbitrator focused not on the Jones-Goodwin conversation as conduct protected by the Act, but on whether the conference room conduct was protected. His clarification decision does contain a statement, not otherwise expanded on, that Goodwin had ''not engaged in appropriate union activity on the morning in question, justifying mitigation of the charges.'' It is not clear what he meant by ''appropriate union activity,'' for he fails to discuss the issue further. He certainly did not exam-

[2] Goodwin appears to have signed both documents on the same day. Both are originally dated April 11, 1988, but the reinstatement agreement had been corrected to May 11. since this document served to settle the grievane and return him to work in May, I infer that both signings were on the same day, May 11. The arbitrator appears, inadvertently, not to have noticed the correction.

[3] In its brief Respondent argues that Jones was not on legitimate union business during this conversation for he was attempting to discuss matters outside the scope of normal union representation, i.e., how to straighten out the personal difficulties of a troubled employee. I disagree. It is for the Union to determine how to represent employees, not Respondent. In any event, insofar as this case is concerned, the union activity in question is Jones' need to advise Goodwin of his upcoming temporary absence, a normal occurrence and most appropriate in the Union's effort to provide proper representation to its constituency. Whether Jones was acting outside the accepted scope of his duty is not the issue; Respondent's treatment of Goodwin for listening to Jones is.

[4] The history to which the arbitrator looked included the ''good citizen'' promise which the arbitrator presumed Goodwin had broken. That promise, however, cannot be interpreted as in any way diminishing Goodwin's Sec. 7 right to be a steward, to perform steward duties, or to speak to another steward about union business. To the extent that the arbitrator believed the promise weakened Goodwin's tenure, it was inappropriate for him to have to have invoked that lessened tenure in analyzing Goodwin's union activity.

ine the Union's claim that the two were engaged in official union business in their capacity as stewards. Nor does he deal with Respondent's contention that the stewards were abusing the ''permission'' system.

In these circumstances, I think it is manifestly clear that the arbitrator's decision is not entitled to deference under the *Spielberg-Olin* rule. He was never asked if the incident in question breached the contract's antidiscrimination clause. Had he been asked to do so, as the Regional Director no doubt assumed he would, then the arbitrator would have decided the same issues which have been charged in the unfair labor practice claim. That he was not initially asked to do so clearly led him to a different analysis. Even the questions which he was asked in his clarification decision demonstrates the different direction in which he was led. He was asked if the conduct for which Goodwin was discharged was protected by the Act. He was, I think, clearly being asked if Goodwin's behavioral outburst was protected, because it was always assumed by the parties that the discharge was actually based upon that behavior. Even the Board would not find that conduct, standing alone, to be protected, so it is not surprising that the arbitrator would not find it protected standing alone. The defect in this analysis is that it did not stand alone; it was the direct product of a disciplinary act aimed at union activity—two stewards conversing about union business.

Therefore, as in *Raytheon Co.*, supra, ''the arbitrator did not even purport,'' at least initially, ''to consider the unfair labor practice issue.'' It is true, I think, that he tried to claim he did, but even a casual analysis shows he did not. Thus, the contractual issue which he decided was not factually parallel to the unfair labor practice issue even if he was presented with facts generally relevant to deciding the unfair labor practice issue. He was looking only at the putative pretext, not the putatively protected conduct. Indeed, he apparently was not even directed to the section of the contract which would have allowed him to treat the conference room conduct as a pretext, for his decision does not contain any reference to the contract's protections of union activity.

Even if the arbitrator had purported to decide the unfair labor practice issue, when one looks to the scenario leading to the conference room incident it becomes quite apparent that the arbitrator's decision does not warrant deferral on ''repugnancy'' grounds. Compare *Garland Coal & Mining*, 276 NLRB 963, 965 (1985). In that case the employer disciplined, for ''insubordination,'' a union official for refusing to sign a document which arguably interfered with union committeemen's ability to perform their union responsibilities. The Board refused to defer to an arbitrator's modification of the discipline saying that any discipline levied against a union leader for his official union activity was repugnant to the policies of the Act, citing the *Olin* language that the arbitrator's decision was ''not susceptible to an interpretation consistent with the Act.'' Similarly, Respondent, through Zachau, inaugurated the entire incident when it levied discipline on Goodwin for his official actions as a union steward, i.e., listening to some information being provided by his chief steward, Jones. The escalating level of discipline which followed was entirely the product of Respondent's reaction to that facially protected conduct. That being the case, the arbitrator's unquestioning acceptance of the discipline is repugnant to the policies of the Act, for it is not susceptible to an interpretation consistent with the Act.[5]

Therefore, on two grounds, failure to decide the unfair labor practice issue and repugnancy, the arbitrator's decision is not entitled to deference.

B. *The Merits*

Since the Board would not defer to the arbitrator's decision here, the next question is the de novo issue of whether Respondent's treatment of Goodwin, warning, suspending, and then discharging him, violated Section 8(a)(3) and (1) of the Act. I think it is quite clear that the General Counsel has made out a prima facie case that Goodwin's suspension and discharge is a violation of those sections of the Act. The chain of events leading to his discharge began with an apparently protected act—one steward speaking about union business with another steward. This led to Zachau's decision to issue a written ''verbal'' warning to Goodwin, but oddly, not Jones, the other steward, or the tag-along employee who accompanied Jones. Zachau and his superior, Yavno, would not even listen to words of explanation from either Jones or Goodwin regarding what they were doing. The deliberate deaf ear which they turned more than merely suggests that they did not want to know what the two stewards were doing; instead it suggests that they knew the two were engaged in some sort of union business, wanted it stopped, and wanted the matter cast in a light where they could credibly contend that Goodwin's union activity was not a consideration. They wished to be able to say they ''Knew nothing.'' Objectively, however, it can be seen as nothing but a direct response to their belief that Goodwin had engaged in union activity without Zachau's permission; that is, Goodwin should have gotten permission to talk to Jones and should have converted his time to the overhead account.

First of all, the conversation occurred between Jones, who had full run of the plant, and Goodwin, who had union steward responsibilities in this very work area. While it is true that Jones had authority to perform union business all over the plant at any time, subject to getting permission from supervisors in the department he was visiting, it is not clear that permission was required in his own department. Even if it was required, his virtually undisputed testimony was that short conversations which did not interfere with production did not require such permission. Moreover, it may be that the practice was even more flexible when one steward needed to speak with another. It also appears that there is a legitimate disagreement between the Union and Respondent regarding how long a conversation can be before permission is required. The contract does not address it, and it appears from Jones and Goodwin that the stewards' practices are somewhat inconsistent throughout the plant; certainly the stewards' collective interpretation markedly differs from that of Respondent.

Whatever might be the proper rule here, it is clear that no one can dispute the fact that the practice of stewards talking to employees without supervisory permission is somewhat unsettled and open to disagreement. In any event, it appears that Goodwin, during this conversation, was where he was

[5] See also the two cases cited in *Garland*, supra, fn. 3: *McGuire & Hester*, 268 NLRB 265 (1983), and *Pacific Coast Utilities Service*, 238 NLRB 599, 606 (1978).

supposed to be, obtaining raw material at the toolcrib. Respondent has not shown how long the ''waiting mode'' was in this instance and even Jones was unsure. It is entirely possible on this record, that the bulk of the 10 minutes, claimed by Zachau as the length of the conversation, was spent in that mode. If that is the case, there is no evidence that any worktime was lost. If the waiting mode was 5 minutes and the conversation lasted 10, then only 5 minutes was lost and would be well within the acceptable range for such a conversation even under Respondent's view. Assuming that no time was involved in waiting (although that would be contrary to the evidence), there has been no showing that any actual production was lost. There is absolutely no evidence in the record showing how quickly a worker must perform his tasks, when the resins are active, before the material becomes unusable. Thus it is entirely possible that even if a full 10 minutes had been expended on this conversation, no production was actually lost.

Moreover, there is an inference of union animus on the part of the two supervisors, Zachau and Yavno. They approached this situation in a very wooden way, brooking no discussion and responding to Goodwin's conduct in an excessive and provocative way. The principal thing which Goodwin did was to tear the warning slip in half while saying ''this is what I think of the warning'' and tearing it in half again, saying to Zachau, ''And this is what I think of you,'' finally balling it up and tossing it on the table in Zachau's direction. Zachau and Yavno's initial claim, later abandoned, that the discipline was in part because Goodwin had ''destroyed Company property'' was absurd on its face and suggests that another motive was in play. This is an exaggerated response to the incident and the Board has held that such exaggeration is evidence of an unlawful motive. *Southern Maryland Hospital*, 288 NLRB 481 (1988). An employee's expression of annoyance during an improperly motivated disciplinary meeting is not a valid ground to declare the conduct sufficiently ''insubordinate'' so as to override the previous protected conduct and insulate the discharge from NLRA scrutiny. Even Goodwin's calling Zachau a liar during this meeting does not change that, for the incident was entirely private and had no tendency to undermine management's authority. Moreover, it sounds as if Zachau did overstate the facts in the subsequent meeting when he asserted he had warned Goodwin over 40 times since his return to work in May; he may have been overstating matters here as well. He did not want to cite that figure to me, though he had earlier said it to higher company officials, clearly triggering Goodwin's ''liar'' accusation then. All of this leads to an inference that Zachau had something else in mind other than straightforward discipline for nondiscriminatory reasons—i.e., attacking a union steward for performing his steward duties. That clearly constitutes union animus on his part.

That Zachau's decision to discipline Goodwin was a provocation cannot be doubted, for, as I have said before, it was levied on Goodwin's protected conduct. In that circumstance the provoked employee is allowed a great deal of latitude. Almost 25 years ago the Fourth Circuit made the following observations in *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (1965):

> The employer contends, however, that its misconduct, even if originally violative of the Act, is absolved by Vaughan's later insubordination. It is conceded that she was angered by her layoff, that she threatened to harm the supervisor who had observed her union activities, and that she was rude to a vice-president several days later, telling him to shut up when he intruded upon her discussion with the president about her being rehired. We in no way condone insubordination and in normal situations it would be a justifiable ground for dismissal. But we cannot disregard the fact that the unjust and discriminatory treatment of Vaughn gave rise to the antagonistic environment in which these remarks were made.
>
> An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment. See *NLRB v. Tennessee Packers, Inc.*, 339 F.2d 203 (6th Cir. 1964). The more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression. To accept the argument addressed to us by the company would be to provide employers a method of immunizing themselves from the only real sanction against violations of section 8(a)(3). Reinstatement in the instance case is not, as the employer puts it, a reward to the employee for insurgency. Rather, as we see it, refusal to reinstate her would put a premium on the employer's misconduct.

Clearly, an employer is not permitted to reap the reward generated by its own misconduct and that is what happened here.

Thus, I conclude that the General Counsel has made out a prima facie case that Respondent set in motion this discharge proceeding either because of the Jones-Goodwin conversation or because of Goodwin's status as a steward. That being the case, the burden has shifted to Respondent to demonstrate that Goodwin would have been discharged even absent that conversation or his steward status. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Here, Respondent's only defense is that Goodwin was insubordinate during the disciplinary meeting. I have already found that his conduct was a direct response to his having been chastised for his protected activity and was not sufficiently egregious to warrant stripping him of his Section 7 protection. See also *E. I. du Pont & Co.*, 263 NLRB 159 (1982) (calling supervisor a liar and other conduct). Accordingly, Respondent's defense is insufficient to rebut the prima facie case. I am obligated to conclude, therefore, that Respondent suspended and subsequently discharged Goodwin for reasons prohibited by Section 8(a)(3) and (1) of the Act.

THE REMEDY

Having found Respondent to have engaged in certain violations of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action shall include an order requiring Respondent to immediately offer Goodwin

reinstatement to his former job and to make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. Respondent Teledyne Industries, Inc., Teledyne Ryan Aeronautical Division is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local No. 506 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act when, on July 18, 1988, it issued a warning to its employee Tyrone L. Goodwin, suspended him, and subsequently discharged him because of his activities protected by Section 7 of the Act or because of his status as a union steward.

[Recommended Order omitted from publication.]